***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

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P/S

# 75-1413

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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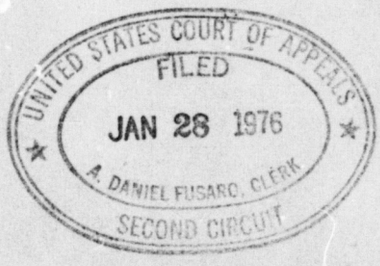
| UNITED STATES OF AMERICA,<br>Appellee,<br>-against-<br>JERRY WAYNE NEAL,<br>Appellant. | Docket No. 75-1413 |

## BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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# BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

## QUESTION PRESENTED

Whether appellant's testimony that the Government informer supplied appellant with the contraband shotgun for transfer to the agent and evidence that the informer acted on a contingency basis required that the jurors be instructed that if they found the Government's conduct to be as alleged, they must acquit appellant.

## STATEMENT PURSUANT TO RULE 28(a)(3)

### Preliminary Statement

This appeal is from a judgment of the United States District Court for the Eastern District of New York (The Honorable Mark A. Costantino) rendered on December 12, 1975, convicting appellant of possession of an unregistered sawed-off shotgun (26 U.S.C. §§5861(d), 5871) (Count Two) on which the required serial number had been obliterated (26 U.S.C. §5861(h); 26 U.S.C. §5871) (Count Three), and sentencing him to three years' imprisonment on each count, the terms to run concurrently.*

The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

### Statement of Facts

Appellant was indicted** for dealing in firearms without being licensed to do so and with possession of an unregistered

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*As of this date the minutes of sentence have not been prepared by the court reporters. When those minutes are received, an application to file a supplementary brief will be made if necessary.

**The indictment is "B" to appellant's separate appendix.

sawed-off shotgun, the serial number of which had been obliterated. At trial, the evidence for the prosecution was presented through Francis McCann, an agent of the Bureau of Alcohol, Tobacco and Firearms.* Countering McCann's testimony was that of appellant.

Agent McCann worked in an undercover capacity with an informer named "Joe" (24**). Joe's fee arrangements with the Government were contingent upon Joe's ability to make cases. Joe was paid for expenses of up to $50 for every investigation instituted based on his information (24). There were also promises of a "reward" (24-25), usually involving "a couple of hundred dollars" (100) for good cases (24-25). The award would be determined

> ... on the amount of work he put into a particular investigation. It would be determined on the result of the investigation and it would be determined on what the agency felt would be fair, a fair amount of money to give him.
>
> (100).

For the case against appellant, Joe was paid an extra $100 (104).

On February 13, 1975, Joe, who was a resident of the Collingwood Hotel, introduced appellant, a bellboy at the same hotel, to Agent McCann (24-27). McCann asked if appellant was

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*Another agent, Kocker, was called to give brief testimony in rebuttal.

**Numerals in parentheses refer to pages of the transcript of the trial.

aware of why McCann was at the hotel (27). Appellant answered affirmatively, and took McCann to a place on the second floor.

Appellant said he knew McCann was there for guns. McCann claimed to be from the Irish Republican Army, supplied with funds necessary to buy guns, but with a requirement that transactions be carried out secretly.

Appellant said he had a source for guns in Brooklyn and North Carolina and that he could get sawed-off shotguns which would cost $200 (31) and "Saturday night specials" (30). McCann disclaimed interest in both types of guns (30, 31), but agreed to buy a shotgun on condition that he get a heavy handgun (32). Appellant set the next day for the transfer (32).

At the appointed hour and place, appellant failed to meet McCann, who came with Joe (33-34). A short time later, McCann and appellant met inadvertently. Appellant reported he could not get the shotgun (35).

On February 20, 1975, McCann met appellant at the hotel, but McCann could not recall what occurred (36). Appellant failed to appear at the next rendezvous, scheduled for February 21, 1975, for a sale of a handgun (37).

On February 25, 1975, appellant sold McCann a revolver (Government Exhibit #1) for $65 (39, 43). The sale took place in the presence of Joe, who had come to the scene with McCann (38). Appellant reportedly said that $65 was a good price and that it would keep McCann interested (44). McCann told

appellant to reach him through Joe (45).

In the early morning of February 28, 1975, McCann met appellant in Brooklyn. Appellant was accompanied by Joe and another man. While Joe and the other man walked down the street, appellant allegedly sold McCann a shotgun (50) (Government Exhibit #2).* Appellant asked for $250 (60), which surprised McCann, who expected to pay only $100. The two finally agreed on $225 (61-62). Appellant allegedly stated that the price would be lower if McCann bought in bulk (61).

The next meeting about which McCann had a memory was held on March 1, 1975. Joe was present. Appellant mentioned that his North Carolina connection had an automatic rifle. He reported that he didn't have enough front money to make any large purchase (64).

On March 17, 1975, appellant said he was going to Brooklyn to meet a connection to explore advance sources for bulk purchases (66). McCann said he would take sawed-off shotguns (66).

On March 31, 1975, appellant and McCann met for an exchange of a handgun. Appellant appeared at the nighttime meeting without the promised handgun (68-69). Surveillance agents watching the meeting inaccurately interpreted the light

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*Deep scratch marks obliterated the serial number of the gun (52). Records of the Bureau indicate that the numbers, which were raised by chemical means (53), were not of a weapon registered to appellant (54).

going on in appellant's car as the signal to make an arrest upon completion of the sale (72). To avoid revealing their involvement in the investigation, the agents had to simulate McCann's arrest (73). Since appellant had no gun, there was no basis for arresting him, and no charges were brought (74).

McCann subsequently introduced appellant to a woman whom McCann represented as one interested in buying guns. She, too, was an agent (76). Despite conversations about sales, appellant failed to supply any weapons (79).

Appellant was arrested on April 10, 1975 (80).

Testifying in his own behalf, appellant reported events which occurred prior to his introduction to McCann. Appellant met Joe at the Collingwood Hotel. On one occasion when appellant was helping Joe move from one room to another, appellant saw a rifle among Joe's clothes. Joe said he was in the business of selling guns and asked appellant to get some for him (126-127). Although appellant said he did not know where to get guns, Joe was always talking about getting guns.

Finally, appellant agreed to sell the pistol he had obtained to guard his home, which had been burglarized three times. He sold the gun to McCann, to whom he had been introduced by Joe (130). The price was $65, but appellant had to give $30 of that amount to Joe for making the introduction (131).

Appellant said it was Joe's request for a favor which involved appellant in the sale of the shotgun. Because Joe

had no car, appellant drove Joe to pick up a shotgun and then to deliver it to McCann in Brooklyn (132, 134). McCann got the shotgun from appellant's car because that is where Joe had put it. From the transaction Joe got $175 of the total $225; appellant got $50.

Appellant said he had no sources for weapons, and reported he had claimed to have such a source to keep Joe from "bugging" him (137, 139).

At the conclusion of appellant's case, the Government announced its intention to present rebuttal evidence. The Assistant U.S. Attorney complained about the possibility of having to call the informer as a witness:

> Your Honor, this puts me in a rather bad position. Obviously the Government when possible doesn't like to use informants publicly. We don't like to talk about who they are and how they cooperate. Obviously that would compromise all informants. I don't think the informant is an issue in this case. If I put the informant on the stand it will be a very bad practical move. This should not turn into a fight of whether they believe Joe the informant or the defendant. I think it should be whether they believe the defendant or Agent McCann basically as to the ready and willing. He didn't attack that part of Agent McCann's testimony about ready and willing.
>
> (195-196).

And later in the discussion the Assistant U.S. Attorney said:

> Your Honor, at the moment I think chances are slim that I will call the informant. I want to at least speak to him. This man got money from the Government, this is a serious --
>
> (198-199).

The Government did not call the informer as a witness.

In preparation for the Judge's instructions defense counsel submitted his "Request to Charge No. 7":

> If you determine from all the evidence beyond every reasonable doubt, that before anything at all occurred respecting the alleged offense in this case, the defendant was ready and willing to commit crimes such as charged in this indictment, you must still find the defendant not guilty unless you are also satisfied from the evidence beyond a reasonable doubt that the defendant did not obtain the shot gun in question from the informer.
>
> (Appendix "D").

At the conclusion of the trial, defense counsel argued that appellant had raised the defense of Government involvement:

> ... [I]n this case the one and only material involved is provided [by the Government]. I the defendant is to be believed, and that is a question for the jury, the entire subject matter of the indictment as [sic] provided by the Government agent....
>
> (188).

Later, defense counsel again stated:

> ... The other request which I have, which I consider the more grave, my request Item #7. There is an authority in the Fifth and Third Circuit for the proposition notwithstanding the Russell case and of the one of the five -- five out of the six cases that I have advanced, the five cases all but one are post-Russell decisions and that is the thrust of those decisions are if the contraband itself is provided by the Government or somebody acting at the request of the Government or agent or informant of the Government that that would

> be sufficient if the Jury is not convinced beyond a reasonable doubt that the defendant provided the contraband from his own sources, that would be sufficient grounds for acquittal.
>
> (209).

The Judge refused to give the requested charge (211-212). After the rebuttal testimony, defense counsel again renewed his request to charge. He argued, in addition, that the Government's failure to call the informer as a witness left the testimony concerning the Government's involvement uncontradicted, thereby requiring entry of a judgment of acquittal (237).

After deliberating, the jurors found appellant guilty of possessing an unregistered shotgun with obliterated serial numbers, but acquitted him of dealing in firearms.

## ARGUMENT

**APPELLANT'S TESTIMONY THAT THE GOVERNMENT INFORMER SUPPLIED APPELLANT WITH THE CONTRABAND SHOTGUN FOR TRANSFER TO THE AGENT AND EVIDENCE THAT THE INFORMER ACTED ON A CONTINGENCY BASIS REQUIRED THAT THE JURORS BE INSTRUCTED THAT IF THEY FOUND THE GOVERNMENT'S CONDUCT TO BE AS ALLEGED, THEY MUST ACQUIT APPELLANT.**

According to appellant's testimony at trial, he would not have possessed the shotgun, which conduct resulted in his conviction, if Joe, the informer, had not arranged for and obtained the shotgun which was sold to Agent McCann. Moreover, according to the testimony of McCann himself, Joe was paid by the Government for this service, and further, in special cases such as this one, was paid a reward, with all the recognized inducements to fabricate and manufacture cases such a method of payment creates. If the jurors believed appellant's testimony, which was given added credibility by the evidence of Joe's financial arrangements with the Government, the Government's conduct amounted to an impermissible degree of "creative activity" (Sorrells v. United States, 287 U.S. 435, 441, 451 (1932); Sherman v. United States, 356 U.S. 369, 372 (1958)) , and, whether termed a denial of due process, entrapment as a matter of law, or conduct calling for an exercise of this Court's supervisory power, vitiates appellant's conviction regardless of how predisposed appellant was to commit the crime. Accordingly, it was error for the trial judge

to refuse to give the charge ("Request #7") requested by defense counsel and urged upon the court no fewer than three times after the requests were submitted.

The Supreme Court, in United States v. Russell, 411 U.S. 423 (1973), continued to adhere (in a five-four decision) to the so-called "subjective" approach to the entrapment defense (Id., at 440), earlier annunciated in Sorrells and Sherman, in which the primary focus is centered on the defendant's criminal pre-disposition rather than on Government misconduct. Russell, however, left open the possible defense that some types of Government activity, touching on "due process principles," can not be countenanced no matter how guilty a defendant otherwise is. Id., at 431-432. See also United States v. Archer, 486 F.2d 670, 676-677 (2d Cir. 1973).

Central to the Court's conclusion in Russell that entrapment had not been shown as a matter of law was the fact that the defendant "was an active participant in an illegal drug manufacturing enterprise which began before the Government agent appeared on the scene, and continued after the Government agent left the scene." Id., at 436. See also United States v. West, 511 F.2d 1083, 1086 (3d Cir. 1975). In this context, the Russell Court deemed it significant that the agent there had only provided the defendant with an obtainable, legally possessed, harmless chemical component which merely enabled the defendant to complete the ongoing, illegal drug manufacturing process. United States v. Russell, supra,

411 U.S. at 432.

In view of Russell, however, "Federal courts have shown grave concern over the government practice of providing [contraband] to those who are, in turn, arrested for possessing or selling [that contraband]" (United States v. Johnson, 495 F.2d 242, 244 n.2 (10th Cir. 1974)), and have distinguished Russell on the basis that the agent there did not actually supply the defendant with the contraband. Where it is uncontradicted that contraband has been supplied, or where, as here, the issue was not given to the jury for resolution when the facts were in dispute, convictions have been reversed irrespective of the presence or absence of a defendant's criminal propensity. See, e.g., United States v. West, supra, 511 F.2d at 1085-1086; United States v. Mosley, 496 F.2d 1012, 1015-1016 (5th Cir. 1974); United States v. Oquendo, 490 F.2d 161, 164 (5th Cir. 1974); United States v. Bueno, 447 F.2d 903, 906 (5th Cir. 1971); cf. United States v. Johnson, supra, 495 F.2d at 244. But see United States v. Hampton, 507 F.2d 832 (8th Cir.) (Heaney, J., dissenting), cert. granted, 420 U.S. 1003 (1975); United States v. McGrath, 494 F.2d 562 (7th Cir. 1974); United States v. Jett, 491 F.2d 1078 (1st Cir. 1974). Those courts which reversed convictions were of the view that if the Government supplied a defendant with contraband, it had engaged in an impermissible degree of creative activity, and that prosecutions based on possessing or selling that contraband were intolerable.

Here, of course, appellant has testified that the Government resorted to such a tactic by supplying the gun sold to McCann, thereby making the transaction possible, when appellant would not have had access to that type of weapon and would not have been in possession of one.*

Thus, this case is very different from the prosecution in which a gun dealer with existing access to weapons is induced to sell the contraband to a Government agent or informer and is subsequently prosecuted for his acts. Here, according to appellant, access to the shotgun in question was provided by the informer, with approval of the Federal agent, knowing that appellant would thereafter be arrested for some violation of weapons control legislation. In short, this case involves deliberate Government action to furnish guns to a person for the sole purpose of prosecuting him for possessing those same guns.** As such, this case falls within Bueno and its progeny and should be reversed on the authority of those decisions.

The tactic of furnishing contraband and then prosecuting for its possession lacks the element of necessity which has generally been used to justify Government undercover involvement in crime. Lewis v. United States, 385 U.S. 206, 208-209

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*While appellant admitted that he had possession of a pistol for protection of his own home, such possession is not violative of Federal law, and there is no basis for assuming that appellant could or would have obtained a shotgun as well.

**Appellant claimed at trial that his sources were nonexistent, and that his claims were merely for the purpose of getting Joe off his back.

(1965). If a person is genuinely predisposed to possess guns, he almost certainly will be able to obtain them through other sources, and can then be legitimately prosecuted for their possession. Indeed, here, although appellant boasted of his sources, except for the one shotgun he said he got from Joe he was never able to produce any weapon. If such a person cannot otherwise obtain guns except through a Government agent, there seems little point to be served in prosecuting him. Comment, Criminal Procedure: Entrapment Rationale Employed to Condemn Government's Furnishing of Contraband, 59 Minn.L.Rev. 444, 457-458 (1974).

On the other hand, reversing the conviction where an informer supplies the contraband would serve to further salutary law enforcement practices. Ibid. At a minimum, it would encourage the Government to exercise greater precaution with and to assert greater control over informers the Government employs.* Furthermore, it would reduce an informer's motivation to deal in contraband, which in turn would further the desired end of reducing the overall trade in guns.

This Court has apparently never decided the issue of whether a new trial is required where it is asserted that the

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*There was in this case no evidence that the Government supervised the informer's activities or in any way instructed him regarding the rules of entrapment. Cf. Williamson v. United States, 311 F.2d 411, 444 (5th Cir.), cert. denied, 381 U.S. 950 (1965).

Government furnishes the contraband* and the factual issues are not given to the jurors for resolution. However, it is not prevented by Russell from reversing appellant's conviction, which is distinguishable on its facts. Here, unlike Russell, the substance the informer was claimed to have supplied was not a harmless, legal chemical, but a dangerous weapon.** Moreover, unlike Russell, appellant's claim was that he had no previous connection with shotguns prior to his involvement with the Government informer. Finally, unlike Russell, Joe was not a trained undercover agent whose job might be jeopardized by overreaching activity, but an informer, who was paid on a reward basis*** for good cases. This latter factor is significant because it may provide an independent basis for finding impermissible Government activity regardless of appellant's predisposition. Williamson

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*Any reliance on this Court's decision in United States v. Rosner, 485 F.2d 1213 (2d Cir.), cert. denied, 417 U.S. 950 (1974), is misplaced. Unlike this case, the agent in Rosner expressed great reluctance to have any dealings with the defendant. More important, the items supplied by the agent to the defendant were not contraband, but "3500" material, which the defendant would have been entitled to get upon trial of the case.

**The issue of whether supplying contraband constitutes entrapment under Russell is currently before the Supreme Court in Hampton v. United States, cert. granted, 420 U.S. 1003 (1975).

***Joe, the informer, received $50 for each case, but was given rewards of up to several hundred dollars for good ones. He was given $100 for this case.

v. United States, supra, 311 F.2d 441; see also United States v. Smith, 508 F.2d 1157, 1170 n.5 (7th Cir.) (Swygert, J., dissenting), cert. denied, 421 U.S. 980 (1975); United States v. Curry, 284 F.Supp. 458, 470 (N.D.Ill. 1968); but see United States v. Grimes, 438 F.2d 391, 394-396 (6th Cir.), cert. denied, 402 U.S. 989 (1971).

In Williamson, the Fifth Circuit held that a contingent fee agreement with an informer to produce evidence against particular defendants as to crimes not yet committed was intolerable, and required reversal of the conviction, at least where, as here, there was no evidence that the Government knew the defendant was engaged in a course of illegal activity and the informer had not been instructed in the rules of entrapment. This Circuit has never expressly rejected the proposition for which Williamson stands. United States v. Archer, 486 F.2d 670, 677 n.6 (2d Cir. 1973); United States v. Cuomo, 479 F.2d 638 (2d Cir.), cert. denied, 414 U.S. 1002 (1973); United States v. Smalls, 363 F.2d 417 (2d Cir.), cert. denied, 385 U.S. 1027 (1967).

While it may be true that the informer here was not paid to produce evidence against appellant in particular (United States v. Cuomo, supra, 479 F.2d at 692), this was another factor presented by McCann's own testimony which was before the jurors for consideration in connection with whether the Government's conduct as alleged by appellant actually occurred.

Further, as defense counsel stated to the court, the failure of the Government to call the informer necessitates a reversal:

> If the informer's testimony would tend to disprove the defendant's story, it was up to the Government to produce him. The defendant, having testified to facts which establish a defense as a matter of law, the Government has the duty to come forward with contrary proof, if it is to carry its ultimate burden of proving guilt beyond a reasonable doubt.
>
> United States v. Bueno, supra, 447 F.2d at 906.

Here, Joe, the informer, was the only person who could explain the way the relationship between Joe and appellant developed. All of this occurred before McCann came into the picture, and there is nothing to indicate that McCann was aware of these initial contacts. Accordingly, the failure of the Government to call the informer to rebut appellant's testimony, and the decision to rely on McCann's testimony, which does not directly approach this issue, is fatal. Even McCann's statement that he never told Joe to act as appellant said he did does not rebut the contention. United States v. Bueno, supra, 447 F.2d at 905.

Thus, the failure to permit the jurors to resolve whatever factual issues were in dispute, as well as the refusal of the Government to call the informer, who alone could rebut appellant's testimony, requires a new trial.

## CONCLUSION

For the foregoing reasons, the judgment below must be reversed and a new trial granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Jan. 28, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.